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COURT OF CRIMINAL APPEALS
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No. PD-0553-20
In the
Texas Court of Criminal Appeals
At Austin

No. 01-18-00897-CR
In the
Court of Appeals for the
First District of Texas
At Houston

No. 1532340
In the 178th District Court
Of Harris County, Texas

JAMAILE JOHNSON
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT WAIVED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Tex. R. App. P. 68.4(d), the State waives oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 68.4(a), a complete list of the names of all interested parties is provided below.

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Trial Judge:

Honorable Carolyn Marks Johnson

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

Appellant was charged by indictment with aggravated robbery. (CR – 14) He was convicted of theft and sentenced to 11 years in the Texas Department of Criminal Justice, Institutional Division. (CR – 87-88, 95-97) Appellant timely filed notice of appeal and the trial court certified his right of appeal. (CR – 100-103) On appeal, appellant argued that the evidence is legally insufficient to support his conviction, the trial court erred by sustaining hearsay objections to certain defense testimony, and he received ineffective assistance of counsel at trial.

STATEMENT OF THE PROCEDURAL HISTORY

On May 28, 2020, a panel of the First Court of Appeals issued a majority opinion that reversed the trial court's judgment and remanded the case for a new trial. *Johnson v. State*, No. 01-18-00897-CR, —S.W.3d—, 2020 WL 2782372 (Tex. App.—Houston [1st Dist.] May 28, 2020, pet. filed). On the same date, a concurring opinion and a dissenting opinion were also issued. *Id.* (Keyes, J., concurring); *id.* (Goodman, J., dissenting). No motion for rehearing was filed.

QUESTION PRESENTED FOR REVIEW

1) Did the court of appeals fail to apply the standard of review correctly in its analysis of appellant's ineffective-assistance-of-counsel claim?

I. Reasons for granting review

This Court should grant review of the court of appeals's decision because (1) the majority has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision power, and (2) the justices of the court of appeals have disagreed as to the proper application of the standard of review. Tex. R. App. P. 66.3(e), (f), 68.1.

ARGUMENT

I. Relevant Facts

On November 28, 2016, the complainant and her husband drove their truck to an auto shop. (RRII – 174, 199-200) The complainant's truck was a 2002 brown cab-and-a-half Chevrolet pickup truck with stripes on the tailgate. (RRII – 175, 203-204, 212) The truck had window tint, but the cab interior was still visible. (RRII – 187; RRIII – 49) The complainant's husband parked at the back of the shop's parking lot and left the truck running while he went inside, leaving the complainant in the passenger seat. (RRII – 177-79, 187-88, 200)

Soon thereafter, appellant rode up to the truck on a bicycle, opened the unlocked truck door, and got into the driver seat. (RRII – 178-79, 187-88; RRIII – 102-103) Appellant had a screwdriver, which he pulled out of his pocket when he was inside the truck. (RRII – 179; RRIII – 100, 104, 119) He began moving the truck back and forth as the complainant tried to get out. (RRII – 180-81) The

complainant eventually jumped out and appellant drove away in the truck. (RRII – 181, 201) Police were called and they located the truck in approximately 15 minutes. (RRII – 161-62, 210) A police chase then ensued for about 45 minutes before police stopped appellant in the truck. (RRII – 217)

At trial, appellant's step-father, Lewis Armstead, testified that he was with appellant at Armstead's mother's house before the offense occurred. (RRIII – 28-30) While they were there, appellant went outside and began rubbing grass on himself. (RRIII – 30-31) When Armstead called out to him, appellant "looked like he was not there . . . ." (RRIII – 31) Afterwards, appellant laid down on a railroad track and started throwing rocks. (RRIII – 31) The police were called but they did not take appellant to the hospital. (RRIII – 32) After the police left, appellant left the house for about 20 minutes and returned in a truck that was not his. (RRIII – 32-34) Armstead also testified that "[c]oming up," appellant had "schizophrenia or something . . . ." (RRIII – 32)

Appellant's brother, Kenyon Johnson, saw appellant during the police chase. (RRIII – 53) When he tried to block appellant and stop him at one point during the chase, appellant just looked at him and "kind of went around" before officers asked Johnson to back off. (RRIII – 53-54) Johnson saw appellant when he was arrested and testified that he looked "[k]ind of spacy. He looked like his normal self. He was kind of calm." (RRIII – 54)

Appellant's mother testified that appellant owned a truck. (RRIII – 58) Appellant's truck was a 1997 Dodge Ram extended cab pickup truck that was a gray, primer-like color with no stripes or window tint. (RRIII – 54-55, 101, 115) Appellant's mother testified that the truck had been in Beaumont before the offense. (RRIII – 58) An Anahuac Police Department officer informed her that appellant had been seen on the freeway licking the guardrail. (RRIII – 58)[1] She did not know how appellant returned to Houston, but when she saw him, "his appearance was aggravated, [and was] not his normal demeanor with me." (RRIII – 59) Appellant was not able to have what his mother would call a normal conversation with her. (RRIII – 60) When asked to describe how the conversation was not normal, she testified:

> I said to him that I didn't have his truck, his brother didn't have his truck, his truck was not in Houston. I don't think he understood or believed that.

(RRIII – 60) After speaking with appellant, his mother was concerned for his physical wellbeing. (RRIII – 61) However, she was not successful in getting assistance. (RRIII – 61) After appellant's mother testified, the following exchange occurred:

> [Defense Counsel]: Judge, I don't have another witness. If I can ask to approach for one brief thing?

[1]The State objected during this testimony but did not request an instruction to disregard it. (RRIII – 58-59)

THE COURT: Absolutely.

[Defense Counsel]: We're going to offer his medical records.

THE COURT: Response.

[State]: Your Honor, the State objects to relevancy.

THE COURT: Tell me the relevancy at the bench, please.

(Bench conference.)

[Defense Counsel]: These medical records support what Mr. Armstead stated earlier that he is schizophrenic and that he has mental health issues.

[State]: Judge, that all goes to punishment and not to the case in chief.

THE COURT: I'm just asking if it includes the medical records since he came into custody?

[Defense Counsel]: These—this specific set of records does not—this specific set does not include the current incarceration.

THE COURT: Okay. Do we have those records?

[Defense Counsel]: The current records?

THE COURT: Yes.

[Defense Counsel]: If I can explain. I have a portion of the current records and because he's under consistent monitoring they're not—this stamp says incomplete because they're updating daily several times a day.

THE COURT: Any response?

[State]: All of this—if we were in an insanity case or something and they had some expert to testify about these records maybe it would be relevant, but right now there is no relevancy or

foundation for this to come in in the case in chief, guilt or innocence.

THE COURT: What I have difficulty with is there's no foundation laid, nobody can support the documents that's [sic] here. I mean, that may be something you're able the [sic] arrange at a later point. I'm going to sustain the objection on the basis of foundation. Thank you.

(Bench Conference Concluded.)

(RRIII – 62-64)

Afterwards, appellant testified that, when he was in Beaumont, he was taken by police to Spindletop Medical Center for a "psych eval." (RRIII – 66, 75) He was later arrested there for trespassing and walked or hitchhiked back to Houston after his release from jail. (RRIII – 82-86) Appellant testified that, when he left his grandmother's house on the date of the offense, he intended to look for his truck and he had an idea where it was located. (RRIII – 94-96) He maintained that the vehicle he took was his own truck. (RRIII – 99-101, 103, 118)

II. The majority's failure to apply the standard of review properly led to its erroneous holding that appellant received ineffective assistance of counsel.

Texas courts must adhere to the two-pronged *Strickland* test to determine whether counsel's representation was inadequate in violation of the Sixth Amendment right to counsel. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *see Strickland v. Washington*, 466 U.S. 668 (1984). Appellant bears

the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson*, 9 S.W.3d at 813.

An appellate court must look to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel. *Id*. While it is possible that a single egregious error can constitute ineffective assistance, this Court is hesitant to designate any error as per se ineffective assistance as a matter of law. *Id*. Judicial review of an ineffective-assistance claim must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Id*.

The majority held that (1) trial counsel's performance was deficient because he failed to properly prepare and offer appellant's medical records into evidence in admissible form; and (2) had the records been admitted, there was a reasonable probability that the result of the proceeding would have been different because the jury would have had a full opportunity to consider appellant's defensive argument that he did not intend to deprive the complainant of her property. *Johnson*, 2020 WL 2782372 at *10, *14; *see* Tex. Penal Code § 31.03(a) (a person commits theft if he unlawfully appropriates property with the intent to deprive the owner of property). In so holding, the majority failed to apply the well-established standard of review in its analysis of appellant's claim. As a result, the majority's holding

that appellant received ineffective assistance of counsel is "mired in error." *See Johnson*, 2020 WL 2782372 at *20 (Goodman, J., dissenting).

A. The majority erred by considering appellant's medical records in its analysis.

In an ineffective-assistance claim, the defendant must produce record evidence sufficient to overcome the presumption that, under the circumstances, the challenged action was sound trial strategy. *Villa v. State*, 417 S.W.3d 455, 463 (Tex. Crim. App. 2013) (citing *Strickland*, 466 U.S. at 689).

In finding that trial counsel was ineffective, the majority relied on the content of medical records which were created during appellant's incarceration for prior offenses. (Def. Ex. 1) *Johnson*, 2020 WL 2782372 at *10, *13-14. However, the records were not admitted into evidence. (RRIII – 62-64, 170-71) They were not made part of an offer of proof or a formal bill of exception. (RRIII – 62-64) *See* Tex. R. Evid. 103 (a)(2); Tex. R. App. P. 33.2. Nor did the parties treat the medical records as an admitted exhibit during trial. (RRIII – 62-64, 171) *See Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) (parties may treat an exhibit, document, or other material as if those items had been formally admitted into evidence, even though they were never formally offered or admitted in the trial court). Appellant also did not attempt to admit the records as part of any motion for new trial.

As a result, the majority's holding erroneously relied on records that appellant never properly included in the trial record to support his ineffective-assistance claim.[2] *See Thompson*, 9 S.W.3d at 814 (on a silent record, defendant failed to rebut the presumption that trial counsel's decision was reasonable); *cf. Rouse v. State*, 300 S.W.3d 754, 762 (Tex. Crim. App. 2009) (appellate court erred by relying on allegations included in post-trial motion because it was not self-proving and was not introduced into evidence at a hearing); *Frangias v. State*, 413 S.W.3d 212, 219 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (op. on remand) (materials filed in the clerk's office in connection with a motion for new trial are not part of the substantive evidence unless accepted into evidence by the trial court at a hearing); *Davis v. State*, 413 S.W.3d 816, 828-31 (Tex. App.—Austin 2013, pet. ref'd) (including in ineffective-assistance analysis an examination of the record both with and without the motion for new trial and its attachments).[3]

[2]It is not entirely clear how the appellate court obtained the medical-record exhibit. When discussing a different exhibit, the trial judge commented, "I usually instruct the court reporter to carry a list of exhibits that are refused exhibits or not used exhibits so that if the case goes up on appeal the Court of Appeals has everything before it. It would be clear in the record that that was not evidence in the case." (RRIII – 6-7) The trial judge also stated, "at the end of the trial I will have the three of you certify that I'm sending the correct exhibits to the jury so you will be the last to see them." (RRIII – 7) At the end of trial, the parties agreed that State's Exhibits 1 through 5, and State's Exhibits 7 through 9, "represent the entirety of the exhibits entered in trial." (RRIII – 170-71) The trial court stated that the medical records "were not admitted to the jury." (RRIII – 171)

[3]The appellate court in *Davis* was unsure whether *Rouse* precluded appellate consideration of certain exhibits attached to the defendant's motion for new trial. *Davis*, 413 S.W.3d at 829.

B. Even if the appellate court was permitted to consider appellant's medical records in its analysis, the majority incorrectly held that the record affirmatively showed trial counsel's performance was deficient.

In an ineffective-assistance claim, a defendant must first show that counsel's performance was deficient, i.e., that his assistance fell below an objective standard of reasonableness. *Thompson*, 9 S.W.3d at 812. Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *Id.* at 813. Failure to make the required showing of deficient performance defeats an ineffectiveness claim. *Id*.

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id*. Trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Absent such an opportunity, an appellate court should not find deficient performance unless the challenged conduct was so outrageous that no competent attorney would have engaged in it. *Id*.

1. The majority speculated from a silent record that trial counsel misunderstood the predicate to introduce the medical records.

Trial counsel did not (1) present a witness to testify that appellant's medical records satisfied the business-records hearsay exception, or (2) bring to the trial court's attention the medical-record affidavit—which was included with the

medical records in the appellate record. (RRIII – 62-64) *See Johnson*, 2020 WL 2782372 at *9. From this, the majority leapt to the conclusion that trial counsel misunderstood the predicate for the introduction of appellant's medical records. *Id.* at *10. The majority determined that this "misunderstanding" was not legitimate trial strategy, and it could not conclude that there was any plausible, professional reason for the failure to properly prepare and offer appellant's medical records into evidence in admissible form. *Id*. Thus, the majority held that trial counsel's performance fell below an objective standard of reasonableness. *Id*.

However, as the majority pointed out, "the record in the trial court does not indicate that appellant's trial counsel had [the medical-record] affidavit when he sought to have the medical records admitted into evidence . . . ." *Id.* at *9. The record shows that trial counsel filed a motion for continuance on September 4, 2018, stating, among other things, that appellant was still waiting to receive approximately 1,000 pages of records in addition to other medical records that were recently received. (CR – 65-66) Trial began on September 13, 2018. (CR – 111; RRII – 1) Notably, the medical records at issue in this case span 1095 pages and the affidavit to which the majority refers was notarized on August 31, 2018. (Def. Ex. 1) *See id.* at *9 n.5.

Therefore, contrary to the majority's implicit assumption, the record does not affirmatively show that trial counsel could have satisfied Texas Rule of

Evidence 902(10)'s self-authentication requirements. *See* Tex. R. Evid. 902(10)(A) (business record accompanied by compliant affidavit is self-authenticating if the proponent serves the record and accompanying affidavit on each other party to the case at least 14 days before trial). Nor does the record affirmatively show whether there was good cause to allow the medical records to be treated as presumptively authentic despite any failure to comply with Rule 902(10)(A). *See id*. 902(10). Because appellant did not file a motion for new trial, his trial counsel was never given an opportunity to explain when he received the records and affidavit or what his efforts were to obtain them. *See Goodspeed*, 187 S.W.3d at 392.

The majority noted that the record does not show that "trial counsel recognized that he could establish the proper predicate for the admission of appellant's medical records by affidavit." *Johnson*, 2020 WL 2782372 at *9. Yet, trial counsel does not have the burden to show he was effective. It is appellant's burden to show that counsel's performance was deficient and he can do so only when the record affirmatively demonstrates trial counsel's alleged ineffectiveness. *Thompson*, 9 S.W.3d at 812-13.

The record also contains no information regarding trial counsel's decision not to call a witness to authenticate or provide the predicate for appellant's medical records. It is plausible that trial counsel did not want to use a witness for this

purpose in order to avoid cross-examination about the more damaging aspects of the medical records. *Cf. Johnson*, 2020 WL 2782372 at *21 (Goodman, J., dissenting) (recognizing possibility that trial counsel would not want expert testimony regarding appellant's medical records because it was possible that an expert would have had to make concessions about the records or the extent to which they support appellant's defense); *see Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007) (presumption that trial counsel's performance was reasonably based in sound trial strategy, coupled with the absence of any supporting evidence in the record of unreasonableness, compels a reviewing court to consider ways in which trial counsel's actions were within the bounds of professional norms).

In concluding that trial counsel misunderstood the procedure to admit appellant's medical records, the majority speculated from a silent record that trial counsel was able, yet failed, to satisfy self-authentication requirements. Further, in holding that the failure to admit the records was deficient performance, the majority ignored the plausible strategy involved in not calling a witness to testify about appellant's prison medical records. Thus, even if the appellate court could consider the contents of appellant's medical records in its analysis, the appellate record does not affirmatively show that trial counsel's performance was deficient.

As a result, appellant failed to establish the first *Strickland* prong and the majority was wrong to hold otherwise. *See Thompson*, 9 S.W.3d at 813.

2. The majority incorrectly assumed that the medical records were otherwise admissible.

Lay and expert testimony of a mental disease or defect that directly rebuts the particular *mens rea* necessary for the charged offense is relevant and admissible unless excluded under a specific evidentiary rule. *Ruffin v. State*, 270 S.W.3d 586, 588, 595-96 (Tex. Crim. App. 2008). But such evidence may be excluded if it does not truly negate the required *mens rea*. *Id.* at 596.

The majority described various mental-health-disorder diagnoses, prescriptions, symptoms, and treatments listed in appellant's medical records. *Johnson*, 2020 WL 2782372 at *13. The majority determined that the records "directly related to whether appellant formed the requisite intent to commit the offense of theft," and provided context for why he would have believed that the complainant's truck was his truck. *Id.* at *10, *14. In concluding that the exclusion of the medical records prejudiced appellant, the majority also stated that the records "would have provided extensive insight into appellant's severe mental health issues and his seemingly abnormal behavior," but their exclusion prevented the jury from getting a "full opportunity" to consider the defensive argument that appellant did not form the requisite intent to commit theft. *Id.* at *12, *14.

However, the dissent aptly observed that the medical records state various medical diagnoses, often without elaboration. *Id.* at *21. Further, the medical records do not document appellant's mental state at the time of the offense. (RRIII – 62-64; Def. Ex. 1) The medical records do not make clear—and no expert testified at trial—that the documented mental-health disorders could have caused appellant to believe that the complainant's truck was his own truck, assuming he was still suffering from those disorders at the time of the offense.[4]

As a result, the medical records do not directly rebut the *mens rea* that appellant intended to deprive the complainant of property when he took her truck. *Compare with Ruffin*, 270 S.W.3d at 596-97 (expert testimony was relevant to whether defendant intended to shoot at police officers or whether, because of a mental disease and the delusions he suffered as a result of that disease, he believed that he was shooting at Muslims or some other figment of his mind); *see also Mays v. State*, 318 S.W.3d 368, 381 (Tex. Crim. App. 2010) (expert testimony that does not directly rebut the culpable mental state usually may be excluded at the guilt stage). Therefore, even if the medical records had survived an objection on foundation grounds, they still would have been inadmissible. Thus, any failure to

[4]Because appellant did not move for a new trial, the record is also silent as to why trial counsel did not have an expert witness testify and why counsel did not seek to admit more recent medical records. (*See* RRIII – 62-64) The dissent correctly recognized that an expert may have had to make concessions about the records or the extent to which they support appellant's defense of mental infirmity. *Johnson*, 2020 WL 2782372 at *21.

"properly prepare and offer appellant's medical records in admissible form" was not deficient performance. *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) (reasonably competent counsel need not perform a useless or futile act).

Had the majority applied standard of review correctly in its analysis, it would have held that appellant did not meet his burden to show on this silent record that trial counsel's performance was deficient. *See Thompson*, 9 S.W.3d at 812-13. The majority's holding otherwise is erroneous.

C. The majority did not consider the entire record or the totality of trial counsel's representation in its prejudice analysis.

If a defendant demonstrates that counsel's performance was deficient, he must then show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 812. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. If the deficient performance might have affected a guilty verdict, the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). An appellate court must examine the totality of the representation and the evidence in evaluating the effectiveness of counsel. *Thompson*, 9 S.W.3d at 813; *Miller*, 548 S.W.3d at 499. Failure to make

the required showing of sufficient prejudice defeats an ineffectiveness claim. *Thompson*, 9 S.W.3d at 813.

In finding that appellant was prejudiced by the exclusion of his medical records, the majority discussed the testimony from the defense witnesses—including appellant—and determined that the medical records would have provided extensive insight into appellant's mental health issues and his behavior. *Johnson*, 2020 WL 2782372 at *11-12. The majority also stated that (1) the records provided context for why appellant would have believed the complainant's truck belonged to him, and (2) exclusion of the records prevented the jury from getting a full opportunity to consider appellant's defensive argument. *Id.* at *14.

However, unlike the testimony of the defense witnesses, the medical records do not speak to appellant's behavior or mental state at the time of the offense. *See id.* at *22 (Goodman, J., dissenting) (recognizing that appellant introduced substantial evidence of his mental infirmity at trial without the records). Additionally, as discussed above, the records do not make clear that the documented mental-health disorders could have caused appellant to believe that the complainant's truck belonged to him. (Def. Ex. 1)

As recognized by the dissent, the medical records also contain damaging information, including: (1) appellant's "significant criminal history," some of which was not related to a mental illness; (2) notations that appellant had

previously been violent; and (3) notations regarding drug abuse. *Id.* at *21-22. The dissent correctly notes that appellant was found guilty of the lesser-included offense of theft instead of aggravated robbery and that, had the jury received "records documenting that [appellant] had previously threatened another with a knife, it could have impacted its deliberations as to whether [appellant] used the deadly weapon to take the truck by threat of violence." *Id.* at *22; *see Thompson*, 9 S.W.3d at 813 (appellate court must look to the totality of the representation and particular circumstances of each case in evaluating effectiveness of counsel).

Finally, in its prejudice analysis, the majority failed to consider all of the evidence admitted at trial, including the evidence that appellant:

- owned a truck that was a different make and color than the complainant's truck;
- was "pretty sure" his truck was impounded after he was arrested in Beaumont;
- did not put his bicycle into the bed of the complainant's truck before driving away from the scene;
- had a screwdriver with him and was prepared to use it to unlock the door or to start the ignition;
- was surprised to see an unknown woman sitting in the truck;
- moved the truck backward and forward while the complainant was trying to get out;
- did not stop the truck when the complainant's husband hit the windshield with a piece of iron;
- did not stop the truck when his brother tried to stop him during the police chase;

- did not stop the truck when the police followed him with lights and sirens activated for 45 minutes; and
- did not tell the arresting officers that the truck belonged to him.

(RRII – 175, 179, 181, 189-90, 201, 203-205, 211-12, 217-18; RRIII – 53-55, 91, 101-102, 112, 115-19, 126, 128-30)

In light of all the evidence admitted at trial, as well as the totality of trial counsel's representation, appellant cannot meet his burden to show on this record that, had the medical records been admitted, there was a reasonable probability that the trial outcome would have been different. *See Thompson*, 9 S.W.3d at 812-13; *Miller*, 548 S.W.3d at 499. The majority incorrectly held otherwise.

The majority erroneously held that trial counsel's performance was deficient and that appellant suffered prejudice as a result. Had the majority correctly applied the standard of review in its analysis, it would have held that appellant failed to meet his burden to show that he received ineffective assistance of counsel.

PRAYER FOR RELIEF

It is respectfully requested that this petition be granted and the lower appellate court's decision be reversed.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent to the following email addresses via e-filing:

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this computer-generated document has a word count of 4,294 words, based upon the representation provided by the word processing program that was used to create the document.

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APPENDIX A

Johnson v. State majority opinion

Opinion issued May 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00897-CR

JAMAILE BURNETT JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1532340

O P I N I O N

A jury found appellant, Jamaile Burnett Johnson, guilty of the felony offense of theft of property with a value of more than $2,500 but less than $30,000.[1] After

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[1] *See* TEX. PENAL CODE ANN. § 31.03(a), (e)(4).

finding true the allegations in two enhancement paragraphs that appellant had twice been previously convicted of felony offenses, the jury assessed his punishment at confinement for eleven years. In three issues, appellant contends that the evidence is legally insufficient to support his conviction, his trial counsel provided him with ineffective assistance of counsel, and the trial court erred in admitting certain evidence.

We reverse and remand.

Background

Veronica Lopez, the complainant, testified that on November 28, 2016, she, along with her husband, Jorge Gonzalez, went to a tire store. Gonzalez drove a brown Chevrolet truck with a stripe and darkened windows. The truck was a family car in Gonzalez's name.

Upon arrival at the tire store, Gonzalez parked the truck in the back of the store's parking lot and got out. The complainant remained inside the truck in the front passenger seat with the truck's engine still running. As the complainant sat in the truck looking at her cellular telephone, she saw appellant riding toward the truck on a bicycle. Appellant opened the unlocked door of the truck and got inside. He had a screwdriver in his hand, but he did not point it directly at the complainant, and the complainant did not see the screwdriver when appellant first entered the truck. Appellant did not hit the complainant with the screwdriver, stab her with the

screwdriver, or point it at her face. Instead, the complainant saw the screwdriver in appellant's hand when his hand was on the gearshift.

The complainant asked appellant if he worked at the tire store, and he told her that he did not. He then asked her if she wanted to go for a ride or if she was "ready for a ride." The complainant felt scared and feared for her life. She yelled and got out of the truck by opening her door and hanging onto it, while appellant accelerated the truck backward and forward. The complainant landed on her feet and was not harmed. According to the complainant, it would have been apparent to appellant that she was upset.

After the complainant exited the truck, the complainant's husband, Gonzalez, threw a wrench at it, which broke the truck's windshield. He also called for emergency assistance. And appellant drove out of the tire store's parking lot. The truck was returned to the complainant later the same day. Several weeks later, the complainant and Gonzalez found a screwdriver in the truck, which they threw away.

Gonzalez testified that he is married to the complainant, and on November 28, 2016, he drove his truck, with the complainant, to a Truck Zone store where he had left his "dumper" for its tires to be replaced. Upon arrival, Gonzalez got out of the truck and went inside the store for about four or five minutes while the complainant remained in the truck. At the time, the truck was still running. While Gonzalez was inside the store, "[t]he tire man yelled . . . that something was happening outside

because [the complainant] was screaming." Gonzalez went back to his truck and saw an unknown person driving his truck backward and forward, while the complainant hung onto the door of the truck. Gonzalez grabbed "a piece of iron" and threw it at the windshield. The complainant got out of the truck, and the person driving the truck drove off in a hurry. Gonzalez got his truck back later that day.

Gonzalez stated that his truck was a 2002 Chevrolet 1500 "[c]ab and a half" and it was used by his family. Gonzalez did not get a clear look at the person driving his truck, and he did not see the screwdriver at the Truck Zone store. He later found a screwdriver in the truck and threw it away.

Galena Park Police Department ("GPPD") Officer J. Torres testified that on November 28, 2016, he was on patrol when he was dispatched to a Truck Zone store in Harris County, Texas. Upon his arrival, the complainant ran toward him screaming that "she had been the victim of a robbery" and her truck had been taken. The complainant told Torres that the truck was a brown Chevrolet truck with a stripe. Torres gave dispatch a description of the truck and the direction in which it was traveling. Other law enforcement officers located the truck and stopped it. There was only one person in the truck, and he was arrested by the officers.

Torres noted that the truck, before being taken, was parked "all the way in the back" of the Truck Zone store's parking lot behind a gate. He could not identify the person who took the truck.

The trial court admitted into evidence a surveillance videotaped recording from the Truck Zone store on November 28, 2016. On the recording, a person can be seen riding a bicycle on the street in front of the Truck Zone store. After passing the Truck Zone store, the person turns the bicycle around and rides into the Truck Zone store's parking lot toward the back. About a minute later, a tan truck with a stripe drives out of the Truck Zone store's parking lot.

Former GPPD Officer P. Orea testified that on November 28, 2016, while on patrol, he went to assist Officer Torres following a call for emergency assistance about a stolen truck at a Truck Zone store in Harris County, Texas. Orea did not go to the Truck Zone store, but instead he went to look for the truck with another law enforcement officer. GPPD Officer Martin, another law enforcement officer assisting in the search, ultimately found the truck on a nearby road. As Martin approached the truck, appellant drove off. After that, Orea followed behind Martin's patrol car as they drove behind the truck, which Orea described as a tan or beige pickup truck with a stripe. Orea and Martin pursed the truck for about forty-five minutes until appellant pulled over and stopped.

Eventually, Officer Martin got appellant out of the truck, and Officer Orea helped arrest him. Appellant was the only person found inside the truck, and no weapon was found by law enforcement officers. When asked whether he knew that

appellant lived in the neighborhood where the truck had stopped during the chase, Orea responded that he did not.

The trial court admitted into evidence a videotaped recording from Officer Orea's body camera taken on November 28, 2016. The recording shows Orea following behind a tan truck with a stripe. Eventually, the truck is stopped, and a man is removed from the driver's seat of the truck. Orea testified, while viewing the videotaped recording at trial, that appellant was the man who was found driving the truck and he was arrested.

Lewis Armstead, appellant's step-father, testified that on November 28, 2016, Armstead went to his mother's house in Galena Park, Texas near the Truck Zone store. When he arrived, appellant was at the home of Armstead's mother, and Armstead spoke with appellant, who initially seemed "like a normal person at the time." At some point, while Armstead was at his mother's house, appellant went outside. Armstead later found appellant sitting in front of the house near a dead-end sign on the street. Appellant was "pulling up grass" and "rubbing it all on him." Armstead went to get his mother, who called to appellant, but appellant "looked like he was not there." Appellant would not answer Armstead's mother; he just looked at her. Armstead went back inside the house. Later, he came outside again and found that appellant had "got[ten] up and walked across the ditch in the mud and water, went on the railroad track, laid down on the track and started throwing rocks."

Armstead kept calling appellant's name and asking if he was okay, but appellant did not respond and continued to look like he was not there. Armstead stated, "that's how . . . he's been"; and while growing up, appellant had "schizophrenia or something." According to Armstead, he and his mother called for emergency assistance that day because of appellant's behavior, but law enforcement officers did not take appellant to the hospital.

Armstead further testified that after the law enforcement officers had left Armstead's mother's house and after appellant had told Armstead that he was going to get his truck, appellant left. Appellant was gone for about twenty or twenty-five minutes and came back driving a truck. Armstead noted that while appellant did own a truck, the truck that he returned in was not appellant's truck. Appellant had originally ridden his bicycle to Armstead's mother's house.

According to Armstead, after appellant arrived back at Armstead's mother's house, appellant wanted Armstead to leave with him, but Armstead chose not to leave. Armstead testified that appellant "was not himself" or in his right mind with "what he was doing" that day.

Kenyon Johnson, appellant's brother, testified that he was present when appellant was arrested and that appellant appeared spacey, normal, calm, and non-combative. Kenyon also stated that appellant's truck was a Dodge extended cab.

Gwendolyn Johnson, appellant's mother, testified that appellant owned a truck, which appellant had in the Beaumont, Texas area at some point. She knew this because a law enforcement officer from the Anahuac Police Department had called her after he found appellant on the highway "licking the guardrail." Gwendolyn did not know how appellant got from the Beaumont area to Houston, but when she saw him, appellant appeared aggravated, which was not his normal demeanor. He was not clean, was not walking normally, and could not have a normal conversation with her. Gwendolyn told appellant that she did not have his truck, his brother did not have his truck, and his truck was not in Houston; but it appeared to Gwendolyn that appellant either did not understand her or he believed that what she was saying was not true. After speaking with appellant, Gwendolyn was concerned for his well-being, but she was unable to get any sort of assistance based on her concerns.

Appellant testified that in November 2016 he was homeless. On November 20, 2016, while driving his truck, a 1997 Dodge 1500 extended cab, he ran out of gas on the Trinity River bridge late at night. At some point, appellant locked his truck with his keys still in the ignition. Eventually, law enforcement officers arrived and a tow truck towed appellant's truck off the bridge. The officers took appellant to Spindletop Medical Center in Beaumont for a psychological evaluation.

Appellant spent a few hours at Spindletop Medical Center and was told that he was discharged. He remained on the property, however, and was arrested for trespassing. Following his release from jail, appellant began walking and hitchhiking around Beaumont to look for his truck. He did not succeed in finding it. Appellant then walked and hitchhiked back to Houston. After arriving in Houston, appellant spent the night with his cousin. He also realized that he needed some money because his truck was missing and it could have been impounded. On November 28, 2016, appellant went to Armstead's mother's house because he planned to ride around on a bicycle to look for his truck and he believed that he knew where it was located.

While looking for his truck, appellant stopped at several places, and as he rode his bicycle to his mother's work, he passed by the Truck Zone store. Appellant then "ca[ught] a glance at [a] truck" "way in the back" of the Truck Zone store's parking lot sitting sideways. According to appellant, his "mind told [him]" that it was his truck. Appellant explained that the truck that he saw in the Truck Zone store's parking lot was similar to and resembled his missing truck. The truck was similar in brand and body style, it had two doors, and it was an extended cab.

Appellant noted that he did not see anyone else around because he was only focused on riding his bicycle to get his truck. Although the truck in the Truck Zone store's parking lot had tinted windows, and appellant's truck did not, appellant stated

at trial that he believed at the time that his truck had been stolen or was missing and "when someone acquire[s] someone[] [else's] property, they are going to alter it a little bit."

Appellant had a "multipurpose tool" with him while he was looking for his truck because he did not have the keys to his truck. And he did not see anyone inside the truck in the Truck Zone store's parking lot because of its tinted windows. Thus, he thought he would have to use the multipurpose tool to unlock the truck.

Appellant first tried to use the multipurpose tool, but he discovered that the truck was unlocked already. When appellant got into the truck, the multipurpose tool was in his pocket. He saw a woman inside his truck, which surprised him. Appellant also saw that the keys were in the truck's ignition, and he noticed that the truck's engine was running. Appellant held the multipurpose tool in his hand while he began shifting gears, but he did not point it at the woman or threaten her. The woman inside the truck smiled at appellant, and he asked if she wanted a ride because he did not know if the woman wanted a ride or not. As appellant explained: "She's in the truck, she's in my truck. I asked her: Do you want to ride because I'm fixing to leave in my truck." Because the woman did not respond to his question, appellant "moved the truck." But once the woman opened her truck door, appellant hit the brake so that she could get out and stand up because he did not want her to be hurt. When asked at trial, "[D]id you want to give [the complainant] an opportunity to get

out?," appellant responded, "Yes." But appellant agreed that if the complainant had wanted a ride to some place, he would have given her one.

After the woman got out of the truck, appellant saw three men approaching the truck quickly, so he put the truck in drive. Someone then threw something long and solid at the truck's windshield. Appellant drove to Armstead's mother's house because Armstead was there and appellant knew that Armstead, his step-father, had been looking for his missing truck as well. When appellant arrived at the house, he told Armstead that he had seen Armstead's truck and asked Armstead if he wanted a ride to go look for his truck. When Armstead declined, appellant left. At some point after driving around for a bit, appellant saw law enforcement officers driving behind him, but he did not think that they were looking for him. Eventually, appellant stopped the truck when he saw a law enforcement officer outside his patrol car with a firearm pointed at the truck. Appellant took the keys out of the truck's ignition, put them on the dashboard, rolled the window down, and put his hands outside the window so that law enforcement officers could see that he did not have a weapon. Law enforcement officers got appellant out of the truck.

On cross-examination, appellant testified that the truck he saw at the Truck Zone store resembled his truck, although his truck was "kind of like gray" and did not have a stripe on it and the truck at the Truck Zone store was tan with a stripe.

Appellant also acknowledged that Armstead had testified that the truck from the Truck Zone store did not look like appellant's truck.

Appellant further testified that initially he did not see a woman in the truck because the windows were tinted. He also did not see a woman when he first opened the door to the truck. He finally noticed the woman after he sat down in the driver's seat and looked at the ignition. Appellant stated that he did not know the woman in the truck and he was surprised to see her inside his truck. But he did ask her if she wanted a ride. The woman at first did not scream when appellant got in the truck. The woman did not start screaming until she was outside the truck.

As for the law enforcement officers who were following him as he drove the truck, appellant reiterated that he did not think that they were after him and the officers might have simply been driving in the same direction he was driving. Appellant stopped the truck because he came upon a red light and he noticed that a law enforcement officer was pointing a firearm at his truck.

Appellant also stated that he had the multipurpose tool with him because he did not have the keys to his truck and he might need the tool to start its ignition. And at multiple times during cross-examination, appellant stated that the truck from the Truck Zone store was his truck and that he thought that the truck was his own truck. He testified that he did not know where his truck had been taken after he was in Beaumont. Although, at the time, he thought that it could have been impounded, he

was unsure. He testified that he did not tell law enforcement officers that the truck from the Truck Zone store was his truck because no one asked him that question.

Sufficiency of Evidence

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction because the State did not prove beyond a reasonable doubt that he acted with the requisite intent to commit the offense of theft.[2]

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *Williams*, 235 S.W.3d at 750. However, our duty requires

[2] We first review appellant's sufficiency-of-evidence complaint because it is the appellate ground that could potentially afford appellant the greatest possible relief—an acquittal. *See Roberson v. State*, 810 S.W.2d 224, 224–25 (Tex. Crim. App. 1991) (appellate court should not determine ineffective-assistance-of-counsel issue without first reviewing sufficiency of evidence supporting defendant's conviction); *Davis v. State*, 413 S.W.3d 816, 820 (Tex. App.—Austin 2013, pet. ref'd).

us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

In reviewing the legal sufficiency of the evidence, a court must consider both direct and circumstantial evidence, and any reasonable inferences that may be drawn from the evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *see also Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012) (evidence-sufficiency standard of review same for both direct and circumstantial evidence). Circumstantial evidence is just as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). For evidence to be sufficient, the State need not disprove all reasonable alternative hypotheses that are inconsistent with a defendant's guilt. *See Wise*, 364 S.W.3d at 903; *see also Cantu v. State*, 395 S.W.3d 202, 207–08 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). Rather, a court considers only whether the inferences necessary to establish guilt are reasonable based on the cumulative force of all the evidence when considered in the light most favorable to the jury's verdict. *Wise*, 364 S.W.3d at 903; *Hooper*, 214 S.W.3d at 13.

Appellant argues that the State did not prove that he had the intent to deprive the complainant of the truck in the Truck Zone store's parking lot because "[t]he surrounding circumstance[s], upon which intent may be inferred, at best, amount to

a mere modicum of evidence." Appellant asserts that he "believed [the truck] to be his truck" and "his actions and his statement to the [c]omplainant upon entering the truck[] [were] not indicative of an intent to deprive her of 'her' property."

A person commits the offense of theft if he unlawfully appropriates property with the intent to deprive the owner of the property. *See* TEX. PENAL CODE ANN. § 31.03(a); *Byrd v. State*, 336 S.W.3d 242, 250 (Tex. Crim. App. 2011). "Intent is almost always proven by circumstantial evidence." *Trevino v. State*, 228 S.W.3d 729, 736 (Tex. App.—Corpus Christi–Edinburg 2006, pet. ref'd); *see also Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Smith v. State*, 56 S.W.3d 739, 745 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). A person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or to cause the result. TEX. PENAL CODE ANN. § 6.03(a) "A jury may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the accused, and the method of committing the crime . . . ." *Edwards v. State*, 497 S.W.3d 147, 157 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (internal quotations omitted); *see also Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004); *Lee v. State*, 442 S.W.3d 569, 580 (Tex. App.—San Antonio 2014, no pet.) ("While proof of intent cannot rely simply on speculation and surmise, the factfinder may consider the defendant's conduct and surrounding circumstances and events in deciding the issue

of intent."). Intent to deprive must exist at the time the property is taken. *Flores v. State*, 888 S.W.2d 187, 191 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *see also Davis v. State*, No. 14-04-00610-CR, 2006 WL 177581, at *2 (Tex. App.—Houston [14th Dist.] Jan. 26, 2006, pet. ref'd) (mem. op., not designated for publication).

Viewing the evidence in the light most favorable to the verdict, the evidence shows that on November 28, 2016, the complainant's truck was parked in the Truck Zone store's parking lot. The truck was a brown 2002 Chevrolet 1500 "[c]ab and a half" with a stripe and tinted windows. This differed from appellant's truck.

As the complainant sat in the truck, she saw appellant ride his bicycle toward the truck. Appellant opened the door of the truck and got inside. The truck's engine was running at the time, and the complainant was inside the truck in the front passenger seat. Appellant had a screwdriver in his hand. Appellant told the complainant that he did not work at the Truck Zone store and asked her if she was "ready for a ride." The complainant yelled and made it apparent to appellant that she was upset. The complainant got out of the truck by opening her door and hanging onto it while appellant accelerated the truck backward and forward. Gonzalez, the complainant's husband, threw a wrench at the truck, which broke the windshield,

and appellant drove out of the parking lot in a hurry.[3] *See Foster v. State*, 779 S.W.2d 845, 859 (Tex. Crim. App. 1989) ("Evidence of flight is admissible as a circumstance from which an inference of guilt may be drawn."); *Rowland v. State*, 744 S.W.2d 610, 613 (Tex. Crim. App. 1988) (circumstances surrounding way defendant obtained truck constituted evidence he had requisite intent to deprive); *Griffin v. State*, 614 S.W.2d 155, 159 (Tex. Crim. App. [Panel Op.] 1981) ("Intent to deprive must be determined from the words and acts of the accused."); *see also Mitchell v. State*, No. 08-15-00258-CR, 2018 WL 3629384, at *7 (Tex. App.—El Paso July 31, 2018, no pet.) (mem. op., not designated for publication) (evidence sufficient for jury to rationally conclude defendant intended to deprive complainant of car when complainant fell out of car and defendant got in car and drove away); *Frank v. State*, No. 01-16-00197-CR, 2017 WL 1416882, at *4 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication) (evidence sufficient to establish defendant intended to commit theft where complainant saw defendant enter her apartment and confronted him, defendant fled, and complainant saw appellant with her property); *Cano v. State*, No.

[3] The jury viewed the surveillance videotaped recording from the Truck Zone store on November 28, 2016. On the recording, a person can be seen riding a bicycle on the street in front of the Truck Zone store. After passing the Truck Zone store, the person turns the bicycle around and rides into the Truck Zone store's parking lot toward the back. About a minute later, a tan truck with a stripe drives out of the Truck Zone store's parking lot.

13-11-00568-CR, 2012 WL 6061788, at *5–6 (Tex. App.—Corpus Christi–Edinburg Dec. 6, 2012, no pet.) (mem. op., not designated for publication) (defendant's intent to commit theft "indicated by his immediate flight").

Law enforcement officers then located the complainant's truck. When Officer Martin tried to approach the truck, however, appellant drove off. Law enforcement officers pursued the truck for about forty-five minutes until appellant pulled over and stopped.[4] *See Mims v. State*, 434 S.W.3d 265, 273–74 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (evidence legally sufficient to show defendant intended to commit theft where he ran after hearing complainant scream and then led law enforcement officers on car chase); *see also Sneed v. State*, No. 13-05-163-CR, 2006 WL 439859, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 23, 2006, no pet.) (mem. op., not designated for publication) (flight from law enforcement officers constituted circumstance from which inference of guilt may be drawn). When law enforcement officers eventually stopped the truck, appellant was the only person inside. *See Beaver v. State*, No. 11-15-00290-CR, 2017 WL 5195972, at *2–3 (Tex. App.—Eastland Nov. 9, 2017, no pet.) (mem. op., not designated for publication) ("Because the State adduced evidence that [defendant] had not received consent to

[4] The jury also viewed a videotaped recording from Officer Orea's body camera taken on November 28, 2016. The recording shows Orea following behind a tan truck with a stripe on its tailgate. Eventually, the truck is stopped, and a man is removed from the driver's seat of the truck.

remove the vehicle from the dealer's lot and was stopped by the police in possession of the vehicle after [the complainant] had reported it stolen, the jury could infer that [defendant] took the vehicle with the intent to deprive the [complainant] of its property."); *McBride v. State*, No. A14-88-00157-CR, 1989 WL 81326, at *5 (Tex. App.—Houston [14th Dist.] July 20, 1989, no pet.) (not designated for publication) (evidence sufficient where witnesses saw defendant take property and property recovered from defendant at scene).

We note that the record does contain conflicting inferences related to appellant's intent. That said, in conducting a legal-sufficiency review, we must presume that the trier of fact resolved any such conflicts in favor of the State, and we must defer to that resolution. *Padilla v. State*, 326 S.W.3d 195, 200 (Tex. Crim. App. 2010).

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational jury could have determined beyond a reasonable doubt that appellant had the intent to deprive the complainant of the truck in the Truck Zone store's parking lot. *See Blankenship v. State*, 780 S.W.2d 198, 207 (Tex. Crim. App. 1988) ("[W]e test the evidence to see if it is at least conclusive enough for a reasonable factfinder to believe based on the evidence that the element is established beyond a reasonable doubt."). Thus, we hold that the evidence is legally sufficient to support appellant's conviction for the offense of theft.

We overrule appellant's first issue.

Ineffective Assistance of Counsel

In his third issue, appellant argues that his trial counsel did not provide him with effective assistance during the guilt phase of trial because counsel did not properly prepare and offer appellant's medical records into evidence in admissible form when the medical records directly related to whether appellant formed the requisite intent to commit the offense of theft.

The Sixth Amendment to the United States Constitution guarantees the right to the reasonably effective assistance of counsel in criminal prosecutions. U.S. CONST. amend. VI; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see also* TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05; *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (test for ineffective assistance of counsel same under both federal and state constitutions). To prove a claim of ineffective assistance of counsel, appellant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance or trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006). Appellant has the burden to establish both prongs by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). "[A]ppellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see also Strickland*, 466 U.S. at 697.

Generally, a silent record that provides no explanation for trial counsel's actions will not overcome the strong presumption of reasonable assistance. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). However, when trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal. *Lopez*, 343 S.W.3d at 143. In such instances, the record demonstrates that counsel's performance fell below an objective standard of reasonableness as a matter of law and no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of counsel's subjective reasoning. *Id.*

Here, appellant argues that his trial counsel did not provide him with effective assistance because counsel did not properly prepare and offer appellant's medical

records into evidence in admissible form when the medical records directly related to whether appellant formed the requisite intent to commit the offense of theft.

The Texas Rules of Evidence allow the admission of records, such as medical records, kept in the course of regularly conducted activities. TEX. R. EVID. 803(6); *Williams v. State*, 176 S.W.3d 476, 483–84 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Castaneda v. State*, 28 S.W.3d 685, 694 (Tex. App.—Corpus Christi–Edinburg 2000, pet. ref'd) (medical records admissible under Texas Rule of Evidence 803(6)); *Brooks v. State*, 901 S.W.2d 742, 746–47 (Tex. App.—Fort Worth 1995, pet. ref'd) (medical records from jail admissible under Texas Rule of Evidence 803(6)). To be properly admitted under rule 803(6), the proponent of the records must prove that the record was made at or near the time of the events recorded, from information transmitted by a person with knowledge of the events, and made or kept in the course of a regularly conducted business activity. TEX. R. EVID. 803(6); *see also Haq v. State*, 445 S.W.3d 330, 334 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd); *Reyes v. State*, 48 S.W.3d 917, 921 (Tex. App.—Fort Worth 2001, no pet.).

The predicate for admission of a business record may be established through testimony of the custodian of records or another qualified witness or by an affidavit that complies with Texas Rule of Evidence 902(10). TEX. R. EVID. 803(6), 902(10); *see also Dominguez v. State*, 441 S.W.3d 652, 657 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Rule 902(10) . . . provides a cost-effective method of authenticating

business records; it allows business records to be authenticated by an affidavit that substantially conforms to the model affidavit provided in the rule, rather than by live testimony."); *Reyes*, 48 S.W.3d at 921. The predicate witness does not have to be the record's creator or have personal knowledge of the contents of the record. *Canseco v. State*, 199 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *Reyes*, 48 S.W.3d at 921; *Brooks*, 901 S.W.2d at 746. The witness need only have personal knowledge of how the records were prepared. *Canseco*, 199 S.W.3d at 440; *Reyes*, 48 S.W.3d at 921; *Brooks*, 901 S.W.2d at 746.

At trial, when appellant's trial counsel sought to have appellant's medical records admitted into evidence, the following exchange occurred:

[Appellant's Trial Counsel]:	We're going to offer [appellant's] medical records.
THE COURT:	Response.
[State]:	. . . [T]he State objects to relevancy.
THE COURT:	Tell me the relevancy . . . .
[Appellant's Trial Counsel]:	These medical records support what . . . Armstead stated earlier that [appellant] is schizophrenic and that he has mental health issues.
[State]:	. . . [T]hat all goes to punishment and not to the case in chief.
THE COURT:	I'm just asking if it includes the medical records since he came into custody?

[Appellant's Trial Counsel]:	. . . [T]his specific set of records . . . does not include the current incarceration.
THE COURT:	. . . Do we have those records?
[Appellant's Trial Counsel]:	If I can explain. I have a portion of the current records and because he's under consistent monitoring they're not -- this stamp says incomplete because they're updating daily several times a day.
THE COURT:	Any response?
[State]:	. . . [I]f we were in an insanity case or something and they had some expert to testify about these records maybe it would be relevant, but *right now there is no relevancy or foundation for this to come in in the case in chief, guilt or innocence*.
THE COURT:	*What I have difficulty with is there's no foundation laid, nobody can support the documents that's here*. I mean, that may be something you're able [to] arrange at a later point. *I'm going to sustain the objection on the basis of foundation*. Thank you.

(Emphasis added.)

The record reveals that trial counsel did not present a witness, either the custodian of records or another qualified witness, to testify that appellant's medical records were made at or near the time of the events recorded, from information

transmitted by a person with knowledge of the events, and made or kept in the course of a regularly conducted business activity. TEX. R. EVID. 803(6); *Haq*, 445 S.W.3d at 334; *Reyes*, 48 S.W.3d at 921. And although an affidavit from Lisa Lopez, the custodian of records at the University of Texas Medical Branch—Correctional Managed Care, Health Services Archives,[5] is included with appellant's medical records in our record on appeal, the record in the trial court does not indicate that appellant's trial counsel had this affidavit when he sought to have the medical records admitted into evidence or even that trial counsel recognized that he could establish the proper predicate for the admission of appellant's medical records by affidavit. *See* TEX. R. EVID. 803(6), 902(10); *see also Sanders v. State*, No. 01-17-00113-CR, 2018 WL 4129895, at *5 (Tex. App.—Houston [1st Dist.] Aug.

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[5] Lopez in her affidavit testifies:

> I am the Custodian of Records at [t]he University of Texas Medical Branch – Correctional Managed Care, Health Services Archives and my office is located in Huntsville, Texas. In this capacity, I am the individual who can authenticate and certify as official, copies of medical records at the TDCJ Health Services Archives. Attached here to 1095 pages of records from the medical records of [appellant;] said records are kept in the regular course of business by an employee or representative of UTMB-Correctional Managed with knowledge of the act, event, condition, opinion or diagnosis, recorded or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original and no other documents exist in the files on the above named person at TDCJ Health Services Archives.

(Emphasis and internal quotations omitted.)

30, 2018, pet. ref'd) (mem. op., not designated for publication) (affidavit that substantially complies with Texas Rule of Evidence 902(10) will suffice); *Dominguez*, 441 S.W.3d at 657; *Reyes*, 48 S.W.3d at 921. The record shows that trial counsel failed to bring the affidavit to the trial court's attention and did not argue in the trial court that Lopez's affidavit provided the proper predicate for the admission of appellant's medical records. In fact, appellant's trial counsel made no mention of Lopez's affidavit either before or after the trial court denied his request for the admission of appellant's medical records based on "no foundation laid."

Defense counsel must have a "firm command" of the law governing a case before he can render reasonably effective assistance to his client. *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982); *see also Ex parte Welch*, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998) (to be reasonably likely to render effective assistance to his client, trial counsel must be sufficiently abreast of criminal law aspects that are implicated in case); *Ex parte Williams*, 753 S.W.2d 695, 698 (Tex. Crim. App. 1988); *Davis v. State*, 413 S.W.3d 816, 833 (Tex. App.—Austin 2013, pet. ref'd). "This is because the Sixth Amendment at a minimum guarantees an accused the benefit of trial counsel who is familiar with the applicable law." *Ex parte Lewis*, 537 S.W.3d 917, 921 (Tex. Crim. App. 2017) (internal quotations omitted); *see also Aldrich v. State*, 296 S.W.3d 225, 251 (Tex. App.—Fort Worth 2009, pet. ref'd) (trial counsel's errors in misunderstanding and misinterpretation

law and Texas Rules of Evidence were so serious that he was not functioning as counsel guaranteed by Sixth Amendment).

A misunderstanding of the applicable law or the Texas Rules of Evidence is never a legitimate trial strategy. *See Ex parte Welch*, 981 S.W.2d at 184–86 (misunderstanding of law constituted ineffective assistance of counsel); *Ex parte Felton*, 815 S.W.2d 733, 734–36 (Tex. Crim. App. 1991); *Davis*, 413 S.W.3d at 833 (trial counsel's misunderstanding about predicate for introduction of evidence did not constitute legitimate trial strategy and fell below objective standard of reasonableness); *Garcia v. State*, 308 S.W.3d 62, 75–76 (Tex. App.—San Antonio 2009, no pet.); *Aldrich*, 296 S.W.3d at 251 (trial counsel's misunderstanding and misinterpretation of Texas Rules of Evidence fell below objective standard of reasonableness and no plausible strategy existed for counsel's continued misunderstanding); *see also Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005) ("Ignorance of well-defined general laws, statutes and legal propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel . . . .").

Appellant's trial counsel's misunderstanding of the predicate for the introduction of appellant's medical records was not legitimate trial strategy, particularly here where the medical records directly related to whether appellant formed the requisite intent to commit the offense of theft. *See Davis*, 413 S.W.3d at

833–34; *see also Flores v. State*, 576 S.W.2d 632, 634 (Tex. Crim. App. [Panel Op.] 1987) ("It is fundamental that an attorney must acquaint himself not only with the law but also the facts of a case before he can render reasonably effective assistance of counsel.").

Having reviewed the record, we cannot conclude that there was any plausible, professional reason for the failure of appellant's trial counsel to properly prepare and offer appellant's medical records into evidence in admissible form. *See Davis*, 413 S.W.3d at 833–34. Thus, we conclude that there is sufficient evidence in the record establishing that trial counsel's performance fell below an objective standard of reasonableness. *See Ex parte Felton*, 815 S.W.2d at 735–36 (in some circumstances single error by counsel can constitute ineffective assistance); *Ramirez v. State*, 301 S.W.3d 410, 416 (Tex. App.—Austin 2009, no pet.) (record on direct appeal can be sufficiently developed regarding misunderstanding of law). We next determine whether there is a reasonable probability, sufficient to undermine confidence in the outcome, that but for appellant's trial counsel's deficiency, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687–88, 694; *Lopez*, 343 S.W.3d at 142.

The State argues that appellant cannot establish prejudice because the "evidence strongly supports the conclusion that appellant knew the truck he took was not his and that he intended to deprive the complainant of it."

Throughout trial, appellant's trial counsel argued that appellant lacked the requisite intent to commit the offense of theft because appellant believed that the truck he took from the Truck Zone store's parking lot was *his* truck. *See* TEX. PENAL CODE ANN. § 31.03(a) ("A person commits an offense if he unlawfully appropriates property *with intent to deprive the owner of property*." (emphasis added)); *Bryant v State*, 627 S.W.2d 180, 182–83 (Tex. Crim. App. 1982) (holding evidence insufficient to show intent to deprive where defendant testified he believed he owned property and was responsible for it); *Roper v. State*, 917 S.W.2d 128, 131 (Tex. App.—Fort Worth 1996, pet. ref'd) (defendant lacked intent to deprive owner of money when he believed he was entitled to money for unpaid work he had performed). And to support this defensive-strategy, trial counsel elicited testimony from several witnesses related to appellant's intention.

For instance, Armstead, appellant's step-father, testified that on November 28, 2016, appellant was not in a normal mental state. Earlier in the day, Armstead found appellant outside Armstead's mother's house "pulling up grass" and "rubbing it all on him." When Armstead's mother called to appellant, appellant "looked like he was not there" and would not answer Armstead's mother; he just looked at her. Later, appellant "got up and walked across the ditch in the mud and water, went on the railroad track, laid down on the track and started throwing rocks." Armstead kept calling appellant's name and asking if he was okay, but appellant did not

respond and continued to look like he was not there. Armstead and his mother called for emergency assistance because of appellant's behavior.

Armstead further testified that on November 28, 2016, after appellant told him that he was going to get his truck, appellant left. Appellant was gone for about twenty or twenty-five minutes and then came back driving a truck. Armstead testified that appellant "was not himself" or in his right mind with "what he was doing" that day. And appellant had "schizophrenia or something."

Gwendolyn, appellant's mother, testified that appellant owned a truck, which appellant had in the Beaumont area at some point. According to Gwendolyn, a law enforcement officer in the Beaumont area had found appellant on the highway "licking the guardrail." Gwendolyn did not know how appellant got from the Beaumont area to Houston, but when she saw him, he appeared aggravated which was not his normal demeanor. He was not clean, was not walking normally, and could not have a normal conversation with her. Gwendolyn told appellant that she did not have his truck, his brother did not have his truck, and his truck was not in Houston; but it appeared to her that either appellant did not understand her or he believed that what she was saying was not true. Gwendolyn was concerned for his well-being, but she was unable to get any sort of assistance based on her concerns.

Appellant testified that on November 20, 2016, while driving his truck, a 1997 Dodge 1500 extended cab, he ran out of gas on the Trinity River bridge late at night.

At some point, appellant locked his truck with his keys still in the ignition. Eventually, law enforcement officers arrived and a tow truck towed appellant's truck off the bridge. The officers also took appellant to Spindletop Medical Center in Beaumont for a psychological evaluation.

Appellant spent a few hours at Spindletop Medical Center and was told that he was discharged. He remained on the property, however, and was arrested for trespassing. Following his release from jail, appellant began walking and hitchhiking around Beaumont to look for his truck. He did not succeed in finding it. Appellant then walked and hitchhiked back to Houston. Once back in Houston, appellant realized he needed money because his truck was missing.

On November 28, 2016, appellant planned to look for his truck on a bicycle, and he believed that he knew where it was located. While looking for his truck, appellant stopped at several places, and as he rode his bicycle to his mother's work, he passed by a Truck Zone store. Appellant then "ca[ught] a glance at [a] truck" "way in the back" of the Truck Zone store's parking lot sitting sideways.

According to appellant, his "mind told [him]" that it was *his* truck in the back of the parking lot. Appellant testified that the truck that he saw in the Truck Zone store's parking lot was similar to and resembled his missing truck. The truck was similar in brand and body style, it had two doors, and it was an extended cab. Although the truck in the Truck Zone store's parking lot had tinted windows, and

appellant's truck did not, appellant stated at trial that he believed at the time that his truck had been stolen or was missing and "when someone acquire[s] someone[] [else's] property, they are going to alter it a little bit."

Appellant also testified that he had a "multipurpose tool" with him while he was looking for his truck because he did not have the keys to his truck. And he did not see anyone inside the truck in the Truck Zone store's parking lot because of its tinted windows. Thus, he thought he would have to use the multipurpose tool to unlock it.

When appellant got in his truck, he was surprised to find a woman inside. The woman smiled at appellant, and he asked if she wanted a ride because he did not know if the woman wanted a ride or not. As appellant explained: "She's in the truck, she's in *my* truck. I asked her: Do you want to ride because I'm fixing to leave in *my* truck." (Emphasis added.) Because the woman did not respond to his question, appellant "moved the truck." When the woman then opened her truck door, appellant hit the brake so that she could get out and stand up because he did not want her to be hurt. When asked at trial, "[D]id you want to give [the complainant] an opportunity to get out?," appellant responded, "Yes." But appellant agreed that if the complainant had wanted a ride to some place, he would have given her one.

After leaving the Truck Zone store's parking lot, appellant drove to Armstead's mother's house because Armstead was there and appellant knew that Armstead had also been looking for his own missing truck. When appellant arrived at the house, he told Armstead that he had seen Armstead's truck and asked Armstead if he wanted a ride to go look for his truck. When Armstead declined, appellant left. At some point after driving around for a bit, appellant saw law enforcement officers driving behind him, but he did not think that they were looking for him.

Although the State asserts that appellant's medical records are merely cumulative of the evidence presented by the defense at trial, we disagree. Instead, the medical records that appellant's trial counsel sought to have admitted into evidence at trial would have provided extensive insight into appellant's severe mental health issues and his seemingly abnormal behavior.

The over 1000 pages of medical records reveal that appellant has been diagnosed with mental health disorders, including psychotic disorder with delusions, antisocial personality disorder, schizophrenia, paranoid schizophrenia, depression, and bipolar disorder, and appellant has been prescribed many antipsychotic and antidepressant medications over the years. Appellant has also suffered a head injury in the past and has a "dull range of intellectual functioning."

In the medical records, appellant's mental health issues are described as significant, severe, and chronic. Appellant's mental health issues cause him to be unable to stay focused or recall why he is present at certain places. These issues also cause appellant to engage in inappropriate and bizarre behavior. Appellant lacks self-awareness, hallucinates, is paranoid, and has "little insight into [his] own behavior." Appellant's insight and judgment are impaired, he is unaware of his abnormal behavior, and he sees his abnormal behavior as "normal."[6] Appellant's target problems include extreme or consistent distrust of others, expectation of being exploited or harmed by others, "[b]izarre [c]ontent of [t]hought," "[i]llogical [f]orm of [t]hought/[s]peech," and hallucinations. And appellant's thought processes have been described as "not related to reality" and disorganized. Without medication, appellant likely "suffer[s] from severe and abnormal mental, emotional, and physical distress or deterioration of [his] ability to function independently." And the records show that appellant has a history of not taking his medication.

The records also reveal that in the past, appellant's family had appellant involuntarily admitted for mental health treatment after he engaged in severe

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[6] As the medical records describe, while appellant was previously incarcerated, he "tor[e] his mattress open" leaving "the cotton batting . . . on the floor." The "cotton batting [was then] soaked with urine and . . . feces." The "odor from the room [was] strong of urine and feces." Yet, appellant was "unaware that the condition of his cell [was] not normal." Appellant was further "unable to relate his constant pacing [in his cell] with the pain and swelling [he was feeling] in his feet."

irrational and abnormal behavior, and appellant self-reported that he had twice spent time at the Mental Health and Mental Retardation Authority. While previously incarcerated, appellant received treatment for his chronic psychotic condition and spent at least six months in the Texas Department of Criminal Justice's Skyview Unit—a psychiatric facility.

In his opening statement at trial, appellant's trial counsel told the jury:

> Th[e] incident didn't start on November 28th for [appellant].
>
> Th[e] incident started a few days earlier when he was released from a mental hospital and he walked back from Beaumont to Houston. When he got to Houston he was looking for his truck, he could not find his truck.
>
> On November 28, he rides around the neighborhood. He sees a truck that he believes is his. . . .
>
> So, yes, [appellant] rode up to the truck. He believed it was his truck. He got in the truck. He never said, "I'm taking this truck." . . .
>
> He believed the truck was his truck. That's why he took the truck.

And in his closing argument to the jury, counsel reemphasized:

> One thing we can all agree is that on that video you see [appellant] ride up to the truck. . . . If you pay attention to that video, you see that he passes two other vehicles, one which has his truck up, the tailgate up or the bed up. Another one is over on the side. There are people walking around. We are not talking about some dark, desolate area. We are talking in the middle, there were people around.
>
> If he just wanted to go up and take something, if he's an opportunist, he does not go all the way to the back. He stops right there at the first truck because that first truck is open. It's easy if you want

> to take something and run. But he's not an opportunist. He was there for a reason. He believed that was his truck. You heard it from several times on the witness stand, he thought that was his truck.
>
> . . . .
>
> And I want you to also look at the events that happened prior to. As [appellant] said, this started a few days before when he went to a mental hospital for being out on the side of the road licking -- I believe he said precipitation or water off of a guardrail on the side of the road.
>
> Not normal. Goes to the mental hospital, gets released. Goes from the mental hospital straight to jail and then he's released from jail. He's trying to get back. Mixture of walking and hitchhiking, looking for his truck because he does not know where it is.
>
> In his mind he wants to find his truck so he can get back to Houston. When he gets back to Houston, he charts out that day to try and find his truck.
>
> He tells his family he's trying to find his truck. . . . He[] was going out to visit his mom because his mother had some papers for his truck. And that's when he -- that's when you see him on that video bicycling past. He makes that loop and then comes back around because he thinks he sees his truck. And you can tell the exact moment where he thinks he sees his truck because he goes from riding on the bike to standing up on the back and looking over. At that moment he thinks he found his truck.

Appellant's medical records provide context for why appellant, as his trial counsel argued repeatedly to the jury, would have believed that the truck from the Truck Zone store's parking lot was his truck, when perhaps another person would have not. And because of trial counsel's misunderstanding of the predicate for the introduction of appellant's medical records, the jury did not get a full opportunity to consider appellant's defensive argument at trial—that appellant did not form the

requisite intent to commit the offense of theft. *See Davis*, 413 S.W.3d at 834–36 (counsel's misunderstanding of law deprived fact finder opportunity to consider evidence related to defensive-theory and prejudiced defendant's defense); *Garcia*, 308 S.W.3d at 75–76 (counsel's misunderstanding of the law prejudiced defendant's ability to present his only viable defense); *see also Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992) ("Without giving the jury an opportunity to consider a defense, conviction was . . . a foregone conclusion . . . ." (internal quotations omitted)). This is particularly important because appellant's "intent to deprive the [complainant] of [the] property" was hotly contested at trial. *See* TEX. PENAL CODE ANN. § 31.03(a).

Appellant has shown a reasonable probability, sufficient to undermine confidence in the outcome, that but for his trial counsel's deficiency, the result of the proceeding would have been different. Thus, we hold that appellant's trial counsel provided him with ineffective assistance of counsel during the guilt phase of trial.

We sustain appellant's third issue.

Due to the disposition of appellant's third issue, it is not necessary to address appellant's second issue. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse the judgment of the trial court and remand the case for a new trial.

Julie Countiss
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.

Keyes, J., concurring.

Goodman, J., dissenting.

Publish. TEX. R. APP. P. 47.2(b).

APPENDIX B

Johnson v. State concurring opinion

Opinion issued May 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00897-CR

JAMAILE BURNETT JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1532340

CONCURRING OPINION

I join the majority opinion, which holds that appellant Jamaile Burnett Johnson's trial attorney provided him ineffective assistance of counsel under the constitutional standards set out in *Strickland v. Washington*, 466 U.S. 668, 687–88,

694 (1984), and *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986), by failing to secure the admission into evidence of Johnson's medical records, which were relevant to the issue of his intent to commit theft. I also agree with the majority that Johnson argues on appeal "that his trial counsel did not provide him with effective assistance because counsel did not properly prepare and offer [Johnson's] medical records into evidence in admissible form when the medical records directly related to whether [Johnson] formed the requisite intent to commit the offense of theft." Maj. Op. at 21–22. And I agree with the majority that Johnson's medical records were admissible under Texas Rule of Evidence 803(6)—the business records exception—had defense counsel laid the proper predicate. Maj. Op. 22–26. But I would go further than the majority opinion.

The opinion misses the heart of Johnson's appellate counsel's argument: Johnson's trial counsel was constitutionally ineffective not simply because he failed to lay the predicate for the admission of Johnson's medical records under the business records exception to the hearsay rule but because he failed to lay the predicate for the *relevancy* of those records because he did not plead the insanity defense—an affirmative defense that must be pleaded. Thus, trial counsel could not show that these medical records, showing Johnson's extensive history of treatment for mental illness, were evidence relevant to Johnson's ability to form the intent to commit the crime with which he was charged because of his insanity. *See* TEX.

PENAL CODE ANN. § 8.01(a) (setting out insanity defense and providing that it is affirmative defense to prosecution); TEX. CODE CRIM. PROC. ANN. art. 46C.051(a) (providing that defendant planning to offer evidence of insanity defense must file with trial court pre-trial notice of intention to offer that evidence). By not pleading insanity and by not naming an expert witness to testify to the relevancy of Johnson's medical records as reflecting insanity, Johnson's trial counsel failed to establish a predicate for admission of the records in response to the State's relevancy objection, as both the State and the trial court attempted to remind him.

As the majority opinion shows, the State objected to the admission of Johnson's medical records on the basis that they were not admissible because they were not relevant. Defense counsel responded that "[t]hese medical records support what Mr. Armstead stated earlier that [Johnson] is schizophrenic and that he has mental health issues" and that the current records were not complete "because he's under consistent monitoring they're not—this stamp says incomplete because they're updating daily several times a day." The State then replied, "*[I]f we were in an insanity case or something and they had some expert to testify about these records maybe it would be relevant, but right now there is no relevancy or foundation for this to come in in the case in chief, guilt or innocence*." (Emphasis added). The trial court then sustained the State's objection to the records "*on the basis of foundation*." (Emphasis added.) And still, despite this, Johnson's counsel did not plead the

insanity defense or produce an expert witness to lay the foundation for the relevancy of the records.

The radical failure of Johnson's trial counsel to plead the insanity defense that would have made Johnson's medical records relevant to his ability to form the mens rea of the crime charged was not lost on Johnson's appellate counsel. All of the above exchange underlies Johnson's argument on appeal that

> [w]hile Appellant's medical records are not a part of this record, it is apparent from the statement of defense counsel, which went unchallenged, what they contained – evidence of Appellant's schizophrenia. *It is also clear that Defense counsel's strategy was to get the records before the jury as he offered them. Defendant's trial counsel was constitutionally ineffective*; that is, that counsel was deficient and that the deficiency prejudiced Defendant to the extent that a reasonable person would lose faith in the confidence of the outcome of the trial.

(Emphasis added.) Johnson's full argument on appeal is thus that Johnson's trial counsel could not get Johnson's medical records before the trial court because he did not know how to lay the predicate to establish their relevance. This would have required pleading the affirmative defense of insanity and securing an expert to testify about Johnson's mental history and mental state at the time of the charged crime, thus making the medical records relevant as evidence material to his insanity defense.[1] But his trial counsel did not do the things necessary to lay the foundation for the admission of this evidence.

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[1] To the extent the dissenting justice argues that this argument regarding Johnson's appellate ineffective assistance claim is invalid because it was not expressly made

A defendant cannot be convicted of a criminal offense if he is legally insane at the time of the crime. TEX. PENAL CODE ANN. § 8.01(a); *Dashield v. State*, 110 S.W.3d 111, 113 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (en banc). Insanity is an affirmative defense, and the defendant bears both the burden of proof and the burden of persuasion to demonstrate, by a preponderance of the evidence, that (1) because of a severe mental disease or defect, (2) he did not know that his conduct was wrong at the time of the conduct charged. TEX. PENAL CODE ANN. § 8.01(a); *Afzal v. State*, 559 S.W.3d 204, 207 (Tex. App.—Texarkana 2018, pet. ref'd). "The test for determining insanity is whether, at the time of the conduct charged, the defendant—as a result of a severe mental disease or defect—did not know that his conduct was 'wrong.' Under Texas law, 'wrong' in this context means

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by appellate counsel in support of his ineffective assistance of trial counsel claim, I can only respond that I beg to differ.

But there is an even deeper issue here if, as both the authoring justice and the dissenting justice contend, Johnson's appellate counsel failed to properly raise on appeal the ineffective assistance of Johnson's trial counsel in failing to plead the insanity defense as a necessary predicate to the admissibility of evidence of Johnson's insanity.

One of the most troublesome aspects of current Texas law is that here is no appeal from ineffective assistance in a criminal case committed at the *appellate* level. If counsel is ineffective at *both* the trial and the appellate level the criminal defendant's only remedy is a post-conviction petition for writ of habeas corpus, a proceeding for which the defendant has *no* right to counsel. The result is that if a criminal defendant is deprived of effective counsel at the trial and the appellate level, he is deprived of the right to counsel altogether, in plain violation of his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process of law, and Texas law provides him no remedy for that.

'illegal.'" *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008); *Pham v. State*, 463 S.W.3d 660, 671 (Tex. App.—Amarillo 2015, pet. ref'd); *see also Afzal*, 559 S.W.3d at 207 ("The purpose of the insanity defense issue is to determine whether the accused should be held responsible for a crime, or whether a mental condition will excuse holding him responsible.") (quoting *Graham v. State*, 566 S.W.2d 941, 948 (Tex. Crim. App. 1978)). The issue of insanity "is not strictly medical in nature"; a person may be "medically insane, yet legally retain criminal responsibility for a crime where a mental condition does not prevent him from distinguishing right from wrong." *Afzal*, 559 S.W.3d at 207.

In determining the issue of sanity, the factfinder "is called on to consider the nonmedical evidence in deciding the ultimate issue of culpability." *Id.* The factfinder may consider the defendant's demeanor before and after the offense. *Dashield*, 110 S.W.3d at 115 (citing *Schuessler v. State*, 719 S.W.2d 320, 329 (Tex. Crim. App. 1986), *overruled on other grounds*, *Meraz v. State*, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990)). And it may consider the defendant's medical records. *See id.* (stating that expert medical testimony may be helpful to factfinder, but ultimate determination of sanity "is outside the purview of medical experts and should be left to the discretion of the trier of fact"); *see also Ruffin*, 270 S.W.3d at 596 ("[R]elevant evidence may be presented which the jury may consider to negate the *mens rea* element [of an offense]. And this evidence may sometimes include evidence of a

defendant's history of mental illness.") (quoting *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005)). Here, the medical evidence of Johnson's mental illness was extensive, but his counsel failed entirely to lay the predicate for its admission.

As the majority opinion states,

> Generally, a silent record that provides no explanation for trial counsel's actions will not overcome the strong presumption of reasonable assistance. However, when trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal. In such instances, the record demonstrates that counsel's performance fell below an objective standard of reasonableness as a matter of law and no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of counsel's subjective reasoning.

Maj. Op. at 21 (citations omitted). Here, trial counsel's ineffectiveness is apparent from the record and no reasonable trial strategy could justify counsel's acts and omissions in failing to get Johnson's medical records into evidence and, above all, in failing to plead the insanity defense to show their relevance.

I join in the majority's reasoning—and in Johnson's appellate counsel's—that "[d]efense counsel must have a 'firm command' of the law governing a case before he can render reasonably effective assistance to his client." Maj. Op. at 26–27 (citing cases). And I fully agree with the majority's (and Johnson's) citation to *Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005), as support for the proposition that "[i]gnorance of well-defined general laws, statutes and legal

propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel." *See* Maj. Op. at 27.

Here, Johnson's trial counsel's misunderstanding of the predicate for the introduction of Johnson's medical records to show Johnson's inability to see that his conduct was wrong was clearly "not legitimate trial strategy, particularly [in this case] where the medical records directly related to whether [Johnson] formed the requisite intent to commit the offense of theft." Maj. Op. at 27. It was also grounds for concluding as a matter of law that his counsel was ineffective for failing to plead the insanity defense. Clearly, there is sufficient evidence in the record establishing that trial counsel's performance fell below an objective standard of reasonableness not only because of counsel's failure to introduce the medical records in an admissible form but also for his failure to establish a predicate for their relevance by pleading the insanity defense. Hence, as the majority opinion states, there is surely "a reasonable probability, sufficient to undermine confidence in the outcome, that but for [Johnson's] trial counsel's deficiency, the result of the proceeding would have been different." Maj. Op. at 37; *see Strickland,* 466 U.S. at 694; *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Johnson's counsel's failure to plead the insanity defense and then to offer Johnson's medical records to support that pleading is clearly grounds for finding not only the first prong of *Strickland,* but also the second.

Conclusion

I join the majority opinion in reversing the judgment of the trial court and remanding the case for a new trial. I join in much of its reasoning but would supplement it as stated above.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.

Keyes, J., concurring.

Goodman, J., dissenting.

Publish. TEX. R. APP. P. 47.2(a)

APPENDIX C

Johnson v. State dissenting opinion

Opinion issued May 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00897-CR

JAMAILE BURNETT JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1532340

DISSENTING OPINION

A jury found Jamaile Burnett Johnson guilty of the offense of theft. Johnson appeals from his judgment of conviction contending that:

(1) the evidence is legally insufficient to prove he intended to commit theft;

(2) the trial court erred in excluding testimony as inadmissible hearsay; and

(3) his lawyer provided ineffective assistance at trial.

The majority correctly rejects Johnson's first issue as to the legal sufficiency of the evidence. It does not address Johnson's second issue about hearsay.

The majority reverses and remands for a new trial based on Johnson's third issue. The majority holds that Johnson's trial counsel rendered ineffective assistance by failing to secure the admission of Johnson's medical records into evidence. In her concurrence, Justice Keyes would go further and hold that Johnson's trial counsel rendered ineffective assistance by failing to assert insanity as a defense.

I am not unsympathetic to the majority's concerns. Its holding, however, is not firmly founded in the record and is contrary to the law. I respectfully dissent.

BACKGROUND

At trial, Johnson did not dispute that he took someone else's truck. His defense was that he thought the truck he took was actually his truck due to mental health issues. The jury heard substantial evidence about Johnson's mental health:

In the days leading up to the alleged theft, Johnson was in Beaumont. His truck ran out of gas there, and he locked his keys in the cab. When a local police officer encountered Johnson on the roadside, Johnson's behavior was so erratic that the officer took him to Spindletop Medical Center for a psychiatric evaluation. Johnson refused evaluation but would not leave, which resulted in his arrest for trespassing. Once Johnson was released from jail, he looked for his truck on foot and

eventually hitchhiked to Houston. Though homeless at the time, he hailed from the Houston area.

After Johnson returned to Houston, he saw his mother, and she testified that his demeanor was not normal. They had a conversation about his truck. She told him that his truck was not in Houston, but she did not "think he understood or believed that." She thought he needed help, but she was not able to get him any.

Lewis Armstead, who is like a stepfather to Johnson, testified that Johnson behaved strangely the morning of the theft. Johnson pulled up grass and rubbed it on himself. He later laid down on railroad tracks and threw rocks. Armstead called to Johnson, but Johnson did not respond. Armstead stated that Johnson's behavior that morning resembled behavior that he had displayed while growing up, which Armstead described as "schizophrenia or something." Though Johnson's behavior was concerning enough that the police were called, the police declined to take Johnson to the hospital because the officers determined that he was responsive and lucid. After the officers left, so did Johnson. Armstead testified that when Johnson later returned with the truck, Johnson behaved as if he was not in his right mind.

Johnson's own account of the theft was incredible. He testified that he thought he had found his truck in Houston even though he had left it in Beaumont. When he got into the truck its keys were in the ignition and the truck was running. Johnson was surprised to see a woman whom he did not know in the passenger's seat. He

found her attractive and asked if she wanted to go for a ride. He explained, "She's in the truck, she's in my truck. I asked her: Do you want a ride because I'm fixing to leave in my truck." After she exited the truck, Johnson drove off.

Despite this evidence of mental infirmity, the jury found Johnson guilty of theft. As the majority holds, the evidence is legally sufficient to support the verdict.

LEGAL FRAMEWORK

The Crime of Theft

Theft is a specific-intent crime. *Ex parte Smith*, 645 S.W.2d 310, 312 (Tex. Crim. App. 1983). A person commits the crime of theft "if he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a). Appropriation alone is not a crime; the person must act with the required intent. *State v. Ford*, 537 S.W.3d 19, 24 (Tex. Crim. App. 2017). Intent is almost always proved by circumstantial evidence. *Edwards v. State*, 497 S.W.3d 147, 157 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Jurors may infer intent from any circumstance tending to prove its existence, such as the defendant's acts and words. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Edwards*, 497 S.W.3d at 157. While we review circumstantial evidence of intent like any other element, it is the prerogative of the jurors, as the triers of fact, to decide which inferences are most reasonable when the circumstances could support different inferences. *Thornton v. State*, 425 S.W.3d 289, 304 (Tex. Crim. App. 2014).

Mental Illness as a Defense

Insanity is an affirmative defense. TEX. PENAL CODE § 8.01(a). A defendant is not guilty if he did not know that his conduct was wrong as a result of a severe mental disease or defect. *Id.* In this context, wrong means illegal. *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008). Texas law presumes sanity; the defendant must prove insanity by a preponderance of the evidence. *Id.* at 591–92.

But evidence of mental infirmity may be relevant and admissible even if a defendant does not assert an insanity defense. When a crime requires proof of a specific intent, evidence of mental disease or defect that directly rebuts that specific intent is relevant and admissible unless excluded by an evidentiary rule. *Id.* at 594–96.

A reasonable mistake of fact that negates a defendant's criminal intent also is a defense to prosecution. TEX. PENAL CODE § 8.02(a). But a defendant cannot rely on evidence of a mental disease or defect to establish the defense of mistake of fact because the beliefs of mentally ill persons are not reasonable as a matter of law. *Mays v. State*, 318 S.W.3d 368, 382–84 (Tex. Crim. App. 2010).

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must prove two things: deficient performance and prejudice. *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). The defendant bears the burden of proving

deficient performance and prejudice by a preponderance of the evidence. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). Unless the defendant proves both prongs, we cannot sustain a claim of ineffective assistance. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). The purpose of this two-prong test is to ascertain whether defense counsel's conduct so undermined the proper functioning of the adversarial process that it calls into question the reliability of the jury's verdict. *Villa v. State*, 417 S.W.3d 455, 463 (Tex. Crim. App. 2013).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). Judicial scrutiny of counsel's performance is highly deferential. *Mata v. State*, 226 S.W.3d 425, 428 (Tex. Crim. App. 2007). It is not enough that counsel's performance seems questionable in hindsight. *Prine*, 537 S.W.3d at 117. Nor can we infer deficient performance based on unclear portions of the record. *Mata*, 226 S.W.3d at 432. Rather, the record must affirmatively show that counsel's performance was deficient. *Prine*, 537 S.W.3d at 117. There is a strong presumption that counsel's conduct was reasonable, and the defendant must overcome this presumption to prevail on an ineffective-assistance claim. *Id.* Thus, counsel's deficient performance must be firmly founded in the record. *Id.*

If the record is underdeveloped—as it usually is on direct appeal—we can find counsel's performance deficient only if his conduct was so outrageous that no

competent lawyer would have engaged in it. *Id.* Counsel ordinarily should be afforded the opportunity to explain his conduct before we find his performance deficient. *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013). It is rare that the trial record, standing alone, suffices to show deficiency. *Id.* The reasonableness of counsel's decisions often depends on facts that do not appear in the record. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). An underdeveloped trial record is a difficult hurdle to overcome: the record must show that counsel's performance fell below an objective standard of reasonableness as a matter of law and that no reasonable trial strategy could justify counsel's ostensibly deficient conduct. *Lopez*, 343 S.W.3d at 143. If the record doesn't disclose counsel's reasons for his conduct and a legitimate trial strategy is a possibility, we cannot find him deficient. *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). A finding of deficient performance cannot rest on an appellate court's speculation. *Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004).

A defendant is prejudiced by his trial counsel's deficient performance if there is a reasonable probability that but for counsel's deficient performance the trial's outcome would have differed. *Nava*, 415 S.W.3d at 308. A reasonable probability is one that undermines our confidence in the trial's outcome. *Id.* We may dispose of an ineffective-assistance claim for lack of sufficient prejudice without addressing

deficient performance when a lack of prejudice is apparent. *Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012).

A defendant is not entitled to errorless representation. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013). We therefore must review an ineffective-assistance claim with an eye toward the totality of the representation. *Id.* A single error will seldom suffice to prove ineffective assistance. *Villa*, 417 S.W.3d at 463. A single error does so only if it is both egregious and had a seriously deleterious impact on counsel's representation as a whole. *Frangias*, 450 S.W.3d at 136.

The Limited Role of Appellate Review

An appellate court is a court of review. We review the issues raised by the parties. We generally cannot reverse a judgment on a ground that has not been raised by the parties at trial or on appeal. *Cameron v. State*, 241 S.W.3d 15, 18 (Tex. Crim. App. 2007); *State v. Bailey*, 201 S.W.3d 739, 743 (Tex. Crim. App. 2006).

ANALYSIS

The Majority Opinion is Mired in Error

Johnson contends that his trial lawyer provided ineffective assistance by failing "to offer his medical records in admissible form" because these records showed his "history of mental illness," which was key evidence supporting his "lack of intent and mistake of fact." According to Johnson, these records "would have

been compelling corroboration" of the testimony about his mental infirmity. The majority agrees. For several reasons, I cannot.

First, though Johnson filed his medical records with this court, he concedes that he did not make them part of the record. We cannot consider documents that are not in the record. *See* TEX. R. APP. P. 34.1; *Martin v. State*, 492 S.W.2d 471, 472 (Tex. Crim. App. 1973); *Welch v. State*, 908 S.W.2d 258, 261 n.1 (Tex. App.—El Paso 1995, no pet.). A claim of ineffective assistance that depends on documents that are not in the appellate record is not firmly founded in the record. Johnson's claim fails for this reason alone. *See Prine*, 537 S.W.3d at 117.

Second, the majority faults Johnson's trial counsel for not securing the admission of his medical records with a business-records affidavit. The majority envisions a trial in which the court admits these records and gives them to the jury for it to evaluate without the aid of an expert witness. Johnson's records span almost 1,100 pages. They state various medical diagnoses, often without elaboration, such as "psychotic disorder" and "antisocial personality disorder." How are jurors to know what such diagnoses entail in general let alone how they potentially impact Johnson's ability to form the specific intent required to commit theft? A jury of laymen is not in a position to interpret these medical records without the aid of a medical expert. *See Navarro v. State*, 469 S.W.3d 687, 702 n.7 (Tex. App—Houston [14th Dist.] 2015, pet. ref'd); *State Office of Risk Mngmt. v. Adkins*, 347 S.W.3d 394,

401 (Tex. App.—Dallas 2011, no pet.). The law is clear that a defendant need not prove mental disease or defect through expert testimony. *Turner v. State*, 422 S.W.3d 676, 695 n.39 (Tex. Crim. App. 2013). But if a defendant wishes to prove his mental infirmity through medical records—created by medical experts—the testimony of an expert is required to interpret them. Because the trial court would have been justified in excluding Johnson's medical records on this basis even if they were accompanied by a business-record affidavit, any failing by Johnson's trial counsel with respect to the affidavit was not deficient. *See Grantham v. State*, 116 S.W.3d 136, 147 (Tex. App.—Tyler 2003, pet. ref'd) (appellate courts do not fault trial lawyers for failing to offer inadmissible evidence).

Third, the majority concludes that no plausible trial strategy could explain Johnson's trial lawyer's failure to secure the admission of the medical records. But the need for expert testimony to facilitate their introduction is a possibility. It is possible that an expert would have had to make concessions about the records or the extent to which they support Johnson's defense of mental infirmity. It is conceivable that defense counsel opted not to press the admissibility of the records for this reason. *Cf. Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (noting possibility that counsel who failed to object to report on confrontation grounds may have decided not to do so because testimony of report's author may have been unhelpful). We do not know whether this is the case because the record does not

contain any evidence as to trial counsel's decision-making. Nor do we know whether trial counsel consulted an expert before trial. Without this evidence, we cannot say that Johnson's trial counsel was deficient. *See Garza*, 213 S.W.3d at 348.

Setting aside the possibility of unhelpful expert testimony, the medical records themselves contain information that a reasonable lawyer might have misgivings about introducing before a jury. For example, a June 2011 psychiatric evaluation that indicates Johnson has had mental health problems since 2003 also discloses significant criminal history, including convictions for indecency with a child and unlawful possession of a weapon. Other records provide details about the indecency conviction. A December 2002 record that describes Johnson as "very unpredictable and at one time violent with the staff" states that Johnson pulled a knife on a friend and threatened to kill him. Another from December 2011 refers to "gang issues" and contains an admission from Johnson that he "had multiple offenses and felonies" that were "not related to a mental illness." An October 2014 record notes that Johnson was convicted for possession of morphine. Others note drug abuse. Unlike the majority, I do not think that defense counsel was deficient by failing to ensure that such a mixed bag of information reached the jury during the guilt-innocence phase of trial. Competent defense counsel can reasonably decide that a double-edged sword is too dangerous to wield. *See Depena v. State*, 148 S.W.3d 461, 469–70 (Tex. App.—Corpus Christi 2004, no pet.) (rejecting ineffective-assistance claim when

defense lawyers testified that they did not call witness because her testimony would have been double-edged sword).

Fourth, Johnson has not made any effort to carry his burden to show deficient performance or prejudice. He does not discuss the contents of his medical records in his brief. Nor does his brief contain citations to particular pages or passages from the 1,100 or so pages of medical records that he filed with this court. Johnson thus has not presented his ineffective-assistance claim for our review. *See* TEX. R. APP. P. 38.1(i); *Hawkins v. State*, 613 S.W.2d 720, 735 (Tex. Crim. App. 1981); *Nguyen v. State*, 177 S.W.3d 659, 669 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). Undeterred by this failure, the majority has—without guidance from the parties—decided which statements from these voluminous medical records are dispositive of Johnson's ineffective-assistance claim. In doing so, the majority has abandoned its role as neutral arbiter and instead acts as Johnson's advocate. *See Brown v. State*, 122 S.W.3d 794, 797 (Tex. Crim. App. 2003) (judge's role is one of neutral arbiter between advocates tasked with arguing evidence); *Dees v. State*, 508 S.W.3d 312, 319 (Tex. App.—Fort Worth 2013, no pet.) (appellate court's review of record for error without guidance of counsel "would place the court in a position too similar to that of an advocate as opposed to a neutral arbiter"). The majority's donning of the advocate's mantle is underscored by its failure to acknowledge that Johnson's medical records contain information prejudicial to his defense.

Fifth, the majority's failure to acknowledge that Johnson's medical records contain prejudicial information also skews its analysis of prejudice. Johnson was indicted and tried for aggravated robbery with a deadly weapon. At trial, the woman who was sitting in the truck he took testified that Johnson had a screwdriver. Though Johnson did not point it directly at her, she said that he threatened her with it and that she was very scared. The jury found Johnson guilty of the lesser-included offense of theft rather than aggravated robbery with a deadly weapon. Had the jury received records documenting that Johnson had previously threatened another with a knife, it could have impacted its deliberations as to whether Johnson used the deadly weapon to take the truck by threat of violence. These medical records could have changed the outcome of the trial in more ways than one, not all of them favorable to Johnson.

Johnson introduced substantial evidence of his mental infirmity at trial without the records. Among other things, the jury heard that:

- Johnson's behavior was so erratic that a Beaumont police officer took him to a facility for a psychiatric evaluation in the days leading up to the theft;
- when Johnson returned to the Houston area, his mother thought that his demeanor was abnormal and that he needed help;
- his mother testified that he seemed to believe his truck was in Houston even though she told him that he was mistaken;
- on the morning of the theft, Johnson's behavior was again so erratic that his stepfather called the police for help; and

- Johnson's stepfather stated that Johnson's behavior resembled "schizophrenia or something," which Johnson had long had.

In addition, Johnson testified in his own defense, which gave the jury an opportunity to evaluate his mental wellbeing firsthand. *Campbell v. State*, 125 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (defendant's testimony gave jury chance to personally evaluate his mental faculties). Johnson's own account of the theft was bizarre in almost every respect. He testified that he thought his truck had been impounded in Beaumont, but he nonetheless decided that a truck he happened upon in Houston was his own. He agreed that this truck did not resemble his in certain respects, but he stated that he thought that someone had altered his truck's appearance. When he got in the truck and found it was occupied by a woman he did not know, this did not dissuade him from believing the truck was his. Despite a 45-minute police chase, Johnson did not think the police were after him.

The medical records would have corroborated the preceding evidence of mental infirmity. But unlike the evidence of mental disease or defect that was before the jury, the records also included material prejudicial to the defense. It is not possible on this record to conclude with confidence that the outcome of Johnson's trial would have been more favorable to him if these records had been admitted.

The Concurring Opinion Would Compound the Majority's Errors

Justice Keyes would hold that Johnson's lawyer also provided ineffective assistance by not pleading insanity as an affirmative defense. But Johnson has not

argued that his trial lawyer gave ineffective assistance by failing to plead insanity. This is dispositive. We cannot reverse a conviction on a ground not raised by Johnson. *Cameron*, 241 S.W.3d at 18; *Bailey*, 201 S.W.3d at 743.

Nor was Johnson required to plead insanity to raise mental infirmity as a defense. Because theft is a specific-intent crime, he was entitled to put on evidence of mental disease or defect to negate the specific intent required to commit theft. *See Ruffin*, 270 S.W.3d at 594–96. Johnson did so.

Justice Keyes argues that Johnson's medical records could have been used to show Johnson did not know right from wrong. That's debatable. Johnson's defense, however, was not that he took the truck because he did not know theft is wrong. His defense was that he took the truck because he thought it was his. Justice Keyes urges that no reasonable trial strategy could account for trial counsel's failure to plead insanity, but the record shows the opposite. An insanity defense is incompatible with the defense that Johnson asserted at trial. It is conceivable that defense counsel advised Johnson to dispute intent rather than sanity for any number of legitimate reasons. For example, the state bore the burden of proving intent, whereas Johnson would have borne the burden of proving insanity. *See Ruffin*, 270 S.W.3d 591–92. But the record is silent as to counsel's decision-making, and an ineffective-assistance claim cannot rest on silence. *See Garza*, 213 S.W.3d at 348.

Justice Keyes also assumes that Johnson's trial lawyer could have unilaterally chosen to plead insanity on Johnson's behalf. But this is far from clear and highlights the danger of appellate courts raising and deciding issues unbriefed by the parties.

The decision to plead guilty or assert innocence belongs to the defendant. *Turner v. State*, 570 S.W.3d 250, 274–75 (Tex. Crim. App. 2018). So long as the defendant is competent to stand trial, the ultimate decision to plead not guilty by reason of insanity may well be his to make. *See* TEX. DISC. R. PROF'L CONDUCT R. 1.02(a)(3), (g) (lawyer shall abide by defendant's decision as to plea to be entered in criminal case unless lawyer reasonably believes defendant is incompetent); *see also United States v. Marble*, 940 F.2d 1543, 1547–58 (D.C. Cir. 1991) (trial court must honor competent defendant's choice not to raise insanity defense). Indeed, it is possible that an attorney's decision to plead insanity without his client's assent could itself constitute ineffective-assistance of counsel. *See Dean v. Superintendent, Clinton Corr. Fac.*, 93 F.3d 58, 60–63 (2d Cir. 1996) (assuming defendant had right not to plead insanity but rejecting ineffective-assistance claim because defendant did not show counsel's entry of plea was made over defendant's objection).

As is usually true on direct appeal, our record casts little light on defense counsel's choices. We know that defense counsel and the state moved for an order requiring a psychiatric examination of Johnson to determine his competency to stand trial. The trial court ordered an exam. The results aren't in the record, but we can

infer that Johnson was found competent from the fact that he was tried. Given his unchallenged competency to stand trial and the absence of evidence as to the advice that his trial attorney gave him about whether to plead insanity, we cannot fault defense counsel for pursuing a defense other than insanity. An ineffective-assistance claim must be firmly founded in the record. The ineffective-assistance claim advocated by Justice Keyes has no basis in the record.

CONCLUSION

The majority's doubts as to Johnson's mental health are understandable. I share them. But however well-intentioned, the majority's holding is insupportable on the present record and contrary to the law. I therefore respectfully dissent.

Gordon Goodman
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.

Keyes, J., concurring.

Goodman, J., dissenting.

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